

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY TYRONE ALEXANDER,

Defendant-Appellant.

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UNPUBLISHED

February 8, 2000

No. 213899

Calhoun Circuit Court

LC No. 98-000644-FC

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548. He was sentenced to life in prison without the possibility of parole. He appeals as of right. We affirm.

Defendant first argues that, during jury voir dire, the prosecutor improperly infringed on his right to remain silent and refuse to testify. This issue is not preserved because defendant failed to object when the issue arose and neglected to raise the issue at a time when the trial court could have addressed it. *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998). Regardless, a review of the record reveals that the prosecutor did not infringe on any of defendant's constitutional rights during jury voir dire. Viewed in context, it is clear that the challenged remarks were aimed at ascertaining whether the jurors would fairly listen to and consider the testimony of other participants or coconspirators to the crime who received "deals" from the prosecutor in exchange for their testimony. There was nothing improper with this line of questioning and it did not infringe on defendant's constitutional rights in any manner. Therefore, we find no plain error that affected defendant's substantial rights such that defendant is entitled to relief. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant next argues that the trial court erred when it allowed the prosecution to endorse Antonio Postell as a witness after several days of trial. This issue is also not preserved. *Ho, supra*. Defendant originally objected to the prosecution's motion to endorse Postell, arguing that the endorsement was too late and that it was prejudicial to defendant's trial strategy and defense. On the day that the motion was filed and heard, the trial court refrained from ruling. Instead, it allowed defendant to use the remainder of the afternoon to research potential objections to the prosecution's

motion and to investigate Postell and his allegations. The following morning, prior to the trial court's ruling, defense counsel indicated that he had completed his investigation and was prepared to deal with Postell's testimony. He did not reiterate any objections and, in fact, appeared to acquiesce in the motion. Thus, although defendant originally objected, he subsequently waived his objection and, therefore, this issue is not preserved. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Moreover, the trial court did not abuse its discretion when it allowed Postell to testify. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). The prosecutor learned of Postell's existence during trial and moved to endorse him as soon as possible after interviewing him.<sup>1</sup> The prosecutor did not have a duty to discover Postell, and could not have endorsed or produced him until he learned of his existence. *People v Burwick*, 450 Mich 281, 293; 537 NW2d 813 (1995). The prosecutor showed good cause for requesting to endorse Postell during trial, specifically that he was unaware of Postell until the day before his motion, and further, that Postell's testimony was relevant and material. *Gadomski*, *supra* at 37. Furthermore, other than arguing that Postell's testimony harmed defendant's claim of innocence because it implicated him in the crime, defendant has failed to show that he was prejudiced. He has not demonstrated that his case or strategy was unfairly prejudiced by the last-minute addition of Postell to the prosecution's witness list or that he would have proceeded any differently had he known of Postell's testimony before trial. *Burwick*, *supra* at 295. Finally, defendant was given every opportunity to investigate the expected testimony and prepare to cross-examine and counter it. Defendant's counsel did not request a continuance to conduct further investigation, but rather stated that he was "prepared to deal with [Postell's] testimony." Thus, we conclude that the trial court's decision to allow Postell's late endorsement was not an abuse of discretion.

Defendant next argues that the prosecutor made an improper "community protection" argument during his closing argument. Defendant did not object to the alleged prosecutorial misconduct and thus review of this issue is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or failure to consider this claim would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). The prosecutor did not make an improper civic-duty argument because he did not inject issues broader than defendant's guilt or innocence and did not encourage the jurors to suspend their powers of judgment. *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Moreover, the prosecution's comments in his rebuttal argument responded to statements made by defense counsel during his closing argument. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Considered in light of defendant's closing argument, the prosecutor's comments were appropriate. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant next argues that the trial court improperly ordered restitution as part of his sentence without first considering and exploring the issue of his financial status, obligations and earning capacity. Defendant also seems to suggest that the amount of restitution was improper. Defendant has waived any argument with regard to his ability to pay restitution or the amount of restitution because he did not raise those issues at the time of sentencing. *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997); *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997); *Ho*, *supra* at 192-193.

Nevertheless, we will briefly review this issue because defendant also claims that his counsel was ineffective at the sentencing hearing for failing to raise the issue of his inability to pay restitution.

Defendant argues that when determining the amount of restitution, the trial court must not only consider the amount of the loss sustained by the victim but must also consider the financial resources of the defendant, his earning capacity, and his financial needs as well as those of his dependents. Defendant further argues that the trial court was required to take testimony on these issues before ordering restitution. The law does not support this argument. At the time of defendant's sentencing, the statute required only that the court consider "the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1); MSA 28.1287(767)(1).<sup>2</sup>

The clear language of the statute indicates that the Legislature intended the victim's loss to be the sole criterion considered by a trial court when ordering restitution. Therefore, the trial court was not required to consider defendant's financial resources, needs or earning abilities at the time it ordered restitution; it was only required to consider the amount of the victim's loss. Thus, defendant's argument that the trial court had to take his financial status into consideration has no merit and, because defendant did not challenge the amount of restitution at the time of sentencing, there was no error in the trial court's order of restitution. *Grant, supra* at 243; *Gahan, supra* at 276 n 17.

In addition, defendant's claim that his counsel was ineffective for failing to challenge defendant's financial ability to make restitution is without merit. On appeal, other than pointing to his status as an indigent, defendant fails to establish that he would be unable to pay the restitution. Restitution orders remain in effect until they are satisfied in full, MCL 780.766(13); MSA 28.1287(766)(13), but defendant may petition the court for modification if payment of the order will impose a manifest hardship on defendant or his family. MCL 780.766(12); MSA 28.1287(766)(12). The record discloses no effort by defendant to modify the terms of payment. Because the statute does not provide for consideration of defendant's ability to pay, and because defendant has failed to present any evidence that he lacked the financial resources to pay the restitution over the course of his imprisonment, it would have been frivolous for defense counsel to object to restitution because of defendant's financial status. Counsel is not required to make groundless objections or arguments at sentencing. *People v Rodriquez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Defendant has therefore failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness and that his sentence would have been different had his counsel raised an objection to the order of restitution. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Affirmed.

/s/ William C. Whitbeck  
/s/ Joel P. Hoekstra  
/s/ Donald S. Owens

<sup>1</sup> The prosecution claimed that it learned that Postell was a potential witness on a Friday during trial. The prosecution moved to endorse him on the following Monday.

<sup>2</sup> The statute provides in relevant part:

(1) In determining the amount of restitution to order under section 16 [MCL 780.766; MSA 28.1287(766)], the court shall consider the amount of the loss sustained by any victim as a result of the offense.

\* \* \*

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.